

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 14, 2008 Session

STATE OF TENNESSEE v. DUSTIN WAYNE CAPPS

**Appeal from the Criminal Court for Knox County
No. 85352 Kenneth F. Irvine, Judge**

No. E2007-02734-CCA-R3-CD - Filed March 13, 2009

Defendant, Dustin Capps, was charged with aggravated robbery based upon the robbery of a Pilot convenience store in Knoxville, Tennessee. During the investigation of the robbery, a videotape of the crime from the store's surveillance camera was taken by the police. Sometime between viewing the videotape and the hearing on Defendant's pre-trial motions, the lead investigator lost the videotape. The trial court held a hearing to determine whether Defendant's right to a fair trial had been violated by the loss of the videotape. The trial court determined that the loss of the videotape did violate Defendant's right to a fair trial and subsequently dismissed the indictment. The State appealed the trial court's ruling. After a thorough review of the record, we find that the trial court did not abuse its discretion in dismissing the indictment. Therefore, we affirm the ruling of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Randall E. Nichols, District Attorney General, and Philip H. Morton, Assistant District Attorney General, for the appellant, State of Tennessee.

Mark E. Stephens, District Public Defender and Christy Murray, Assistant Public Defender, for the appellee, Dustin Wayne Capps.

OPINION

On March 6, 2006, a Pilot convenience store in Knoxville, Tennessee was robbed. The suspect, a young white male, allegedly purchased a nutty bar and left on foot. A short time later, the suspect returned. He placed a purple lighter on the counter for purchase. When the cashier opened the cash drawer, the suspect reached over and grabbed the money, totaling \$321.81, from the cash register. The cashier locked the suspect in the store by remote control. The suspect reached in his

pocket and said, “Bitch if you don’t let me out I’m gonna shoot your ass.” She opened the door, and he left on foot. Officer Dennis Bible responded to the call. Another officer who responded confiscated the store’s surveillance tape.

The cashier spoke with some other workers at the convenience store. When she described the suspect to them, they told her that it sounded like “Slim” who stays in the Skylark Apartments. Slim is Defendant’s nickname. The cashier told Officer Bible this information. Two other officers went to Apartment 3 at Skylark Apartments. The individuals in Apartment 3 told the officers that Defendant used to stay in Apartment 15, but they had not seen him in some time.

Investigator Huckleby was assigned to the case. On April 16, 2006, investigators went to Apartment 15. The residents told the investigators that Defendant no longer stayed there and that Defendant’s name was Dustin Wayne Capps. The residents also gave Defendant’s address to the investigators. Investigator Huckleby obtained a photograph of Defendant from a recent arrest for another incident. The sheriff’s office prepared a photographic line-up in which the other individual’s were dressed in black and white striped prison uniforms, and Defendant was dressed in street clothes. On April 16, 2006, the cashier identified Defendant as the robber from the photographic line-up. She was one-hundred percent sure that Defendant was the robber.

On April 19, 2006, Investigator Huckleby interviewed Defendant, who denied robbing the store. Investigator Huckleby reviewed the surveillance tape both at his office and on the equipment at the store. In his report, Investigator Huckleby described the contents of the tape in the following manner:

The video showed the suspect coming into the store three times. The second time the suspect came into the store, the store clerk did not see him. The suspect got into the pay line and decided to walk out of the line and he did not make a purchase. I observed the robbery on the video tape. The suspect was a white male, tall, slim and was wearing a white hat and a white T-shirt. I could not determine on the video if the suspect was [Defendant] or not because the video was of poor quality.

On April 22, 2006, Investigator Huckleby arrested Defendant. The Knox County Grand Jury indicted Defendant for aggravated robbery in September of 2006. On February 12, 2007, Defendant filed a motion for discovery. On September 27, 2007, Defendant filed a motion to suppress the photographic line-up arguing that it was unduly suggestive. On October 9, 2007, Defendant filed a motion requesting the dismissal of his indictment based upon the fact that the State had advised the trial court that the videotape from the store appeared to be “missing” and there was not a copy available for Defendant to review.

The trial court held a hearing on Defendant’s motion on October 24, and November 2, 2007. On November 5, 2007, the trial court announced its findings from the bench on the record. Initially,

the trial court concluded that the missing videotape had some exculpatory value. The trial court based this conclusion on Investigator Huckleby's testimony that he could not positively identify Appellant as the perpetrator based on the videotape. The trial court went on to state that it would never be known if the videotape could have been enhanced so as to improve its quality. Likewise, the loss of the videotape prevented identifying other potential witnesses who might have been able to identify the perpetrator from one of the three times he entered the store. Another issue pointed out by the trial court was the fact that Appellant was indicted for aggravated robbery based upon the use of a weapon, and the videotape might have shown whether or not the perpetrator had a weapon. Investigator Huckleby did not testify whether or not the videotape showed the perpetrator with a weapon. The trial court stated that if the videotape showed that there was not a weapon, the charge would be lowered to misdemeanor theft from aggravated robbery, a felony.

The trial court then turned to the factors set out in *Ferguson*. The trial court held that the degree of negligence was more than simple negligence and most likely gross negligence. The trial court based this conclusion upon the fact that Investigator Huckleby gave the tape back intentionally to the store when the store had not asked for it back, and Investigator Huckleby should have returned the videotape to the property room. The trial court found that the videotape could have been important evidence at trial because it was a recording of the actual offense. The trial court stated that Investigator Huckleby should have at least consulted with the prosecutors before returning the videotape.

The trial court concluded that the videotape was very important evidence in terms of this case. The trial court once again stressed the fact that the videotape was a recording of the actual offense and the only evidence of the videotape that remains is Investigator Huckleby's testimony based upon his viewing the videotape a year and a half before the hearing. The trial court stated that due to the questionable photographic lineup the issue of identification had been raised by the defense and that made the videotape very important in terms of the trial.

The trial court then turned to the probative value and reliability of any secondary evidence of the videotape. The trial court stated that the only secondary evidence of the videotape would be Investigator Huckleby's testimony. The trial court stated that it would not be fair to Appellant to force him to rely upon Investigator Huckleby's testimony. The trial court also stated there was an identification by the store clerk at the photographic lineup, but the trial court did not find this very reliable based upon the issues with the photographic lineup. In addition, the trial court stated, there is no other evidence such as fingerprints collected at the scene or Appellant's possession of items taken from the store. The trial court also stated that it could not evaluate the sufficiency of the other evidence because there had not been a trial at this point.

The trial court stated, in conclusion, that it had attempted to fashion some sort of instruction or remedy short of dismissal. However, after much deliberation, the trial court determined that dismissal was the only appropriate remedy in this case.

The State filed a timely notice of appeal.

ANALYSIS

The State argues on appeal that the trial court abused its discretion in granting Defendant's motion. Defendant disagrees.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides every defendant the right to a fair trial.¹ To facilitate this right, a defendant has a constitutionally-protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Further, the prosecution has a duty to turn over exculpatory evidence that would raise a reasonable doubt about a defendant's guilt. *United States v. Agurs*, 427 U.S. 97, 110-11 (1976).

Our supreme court addressed this issue with regard to missing evidence in *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). In *Ferguson*, the defendant was arrested for DUI. The videotape of various sobriety tests performed by the defendant was inadvertently taped over before his trial. *Ferguson*, 2 S.W.3d at 914. The defendant appealed arguing that the State violated his Due Process rights by failing to preserve the videotape. In its review of the defendant's issue, our state supreme court adopted a test for courts to use in determining whether the loss or destruction of evidence has deprived a defendant of a fair trial. *Id.* at 917. The initial analytical step in this test for determining whether there was any duty to preserve evidence was described as follows:

Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Id. (quoting *California v. Trombetta*, 467 U.S. 479, 488-89 (1984)). The Court explained that if the proof demonstrates the existence of a duty to preserve the evidence and demonstrates that the State failed in that duty, "the analysis moves to considerations of several factors which guide the decision regarding the consequences of the breach." *Id.* Accordingly, those factors include: "(1) The degree of negligence involved; (2) The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and (3) The sufficiency of the other evidence used at trial to support the conviction." *Id.* at 917. "If, after considering all the factors, the trial judge concludes that a trial without the missing evidence would

¹ "As a general rule, . . . a trial lacks fundamental fairness where there are errors which call into question the reliability of the outcome." *Ferguson*, 2 S.W.3d at 914 n.3 (citing *Betts v. Brady*, 316 U.S. 455 (1942); *Watkins v. State*, 393 S.W.2d 141, 144 (Tenn. 1965); *Lofton v. State*, 898 S.W.2d 246, 248 (Tenn. Crim. App. 1994)).

not be fundamentally fair, then the trial court may dismiss the charges.” *Id.* However, dismissal is but one of the trial judge’s options. *Id.*

“The decision whether to dismiss an indictment lies within the discretion of the trial court.” *State v. Harris*, 33 S.W.3d 767, 769-70 (Tenn. 2000) (citing *State v. Benn*, 713 S.W.2d 308, 311 (Tenn. 1986)). “Appellate courts ‘may not interfere with a ruling made within the discretionary powers of the trial court absent clear abuse.’” *Id.* at 770 (quoting *State v. Street*, 768 S.W.2d 703, 709 (Tenn. Crim. App. 1988)).

The State, Defendant and trial court all agreed that the State had a duty to preserve the evidence. Therefore, our analysis begins with the three factors concerning the consequences of the failure to preserve. The first factor is the degree of negligence. The trial court stated that while Investigator Huckleby did not intentionally lose the tape in an effort to thwart the defense, the loss of the tape would constitute gross negligence. The State argues that the loss of the tape is merely simple negligence. We cannot agree with the State.

We have held that the loss of evidence is simple negligence when the destruction of the evidence was pursuant to a procedure already in place. In *State v. Nathaniel Robinson, Jr.*, No. E2004-02191-CCA-R3-CD, 2005 WL 2276421 (Tenn. Crim. App., at Knoxville, Sept. 19, 2005), *perm. app. denied*, (Tenn. Mar. 13, 2006), we held that the erasing of a videotape of a defendant’s refusal to comply with the implied consent law was simple negligence because, while the department intentionally “taped over” the videotape in question, the department did not erase the tape for the purposes of destroying evidence. 2005 WL 2276521, at *4. The videotape was erased pursuant to the department’s procedure. *Id.* In *State v. Lonnie T. Lawrence*, No. E2007-00144-CCA-R9-CD, 2008 WL 704355 (Tenn. Crim. App., at Knoxville, Mar. 17, 2008), physical evidence was destroyed pursuant to policy because it had allegedly been used in the manufacture of methamphetamine and due to possible contamination. 2008 WL 704355, at *14. We held that the destruction of the evidence was simple negligence because while the officer intentionally destroyed the evidence, he did not destroy it with the intent to deprive the defense of the evidence. *Id.*

Investigator Huckleby first testified that he could not remember what happened to the videotape. While he was testifying, he stated that he returned the tape to the store and that it had likely been reused and taped over in the store’s surveillance camera. Investigator Huckleby’s decision to return the tape to the store was not the procedure of the police department. He had checked the videotape out of the confiscation holds department of the police department. He did not return the videotape to the confiscation holds department. Investigator Huckleby made a unilateral decision to return the piece of evidence to the store because he determined that the videotape was unclear. We cannot agree with the State that this constituted only simple negligence. Investigator Huckleby returned the videotape to the store, not in keeping with department procedure, but of his own accord. In doing so, he deprived both Defendant and the District Attorney of use of the videotape. Therefore, we agree with the trial court’s assessment that this constituted gross negligence.

The second factor is the significance of the destroyed evidence. There is no question that the videotape would be significant at trial because it is a video recording of the offense as it occurred. As the trial court stated, the identity of the suspect would have been a significant issue had the case gone to trial. The way in which the officers went about identifying Defendant as the suspect and the questionable reliability of an arguably suggestive photographic line up both make the videotape important evidence as to the perpetrator's identity. In addition, as the trial court stated, the perpetrator entered the store three times. The videotape could have helped to identify other possible witnesses who could have identified the perpetrator. Also, the videotape could have definitively proven whether the perpetrator used a weapon or not, which could be the difference between a simple robbery and an aggravated robbery conviction. Therefore, we agree with the trial court's finding that the videotape was very significant evidence in this case.

The third and final factor is the sufficiency of other evidence to convict. As the trial court stated, other evidence has not been presented in this case. Investigator Huckleby testified at the hearing on Defendant's motion. He testified as to the contents of the videotape which he watched over a year before the hearing. The record does not contain any testimony from the cashier whose testimony would have been the proof of the offense without the videotape. In addition, there has not been a ruling on the Defendant's motion to suppress the cashier's identification of the Defendant as the perpetrator from the questionable photographic line up.

When analyzing these three factors, we conclude that the balance weighs in favor of Defendant. We have found no abuse of discretion by the trial court in its dismissal of the indictment.

CONCLUSION

For the foregoing reasons, we affirm the ruling of the trial court.

JERRY L. SMITH, JUDGE